alternative to the incumbents' service, and raise serious doubts about the stability of FCC doctrine, thereby deterring investment in any undertaking subject to FCC regulation.

A. The *Local Competition* and *Advanced Services Orders* Created a Regulatory Environment that Encouraged Entrepreneurs to Provide Wireline Broadband Services

The Commission's regulatory actions under the Telecommunications Act of 1996 created an environment that encouraged entrepreneurs like Covad to invest in and develop competitive networks and innovative technologies such as DSL. The 1996 Act and the Commission's implementing regulations fundamentally changed telecommunications regulation by removing the outdated "barriers that protect monopolies from competition" and affirmatively promoting competitive entry and development.[24] From the start, in its 1996 *Local Competition Order*, the Commission specifically contemplated the competitive use of DSL technology over incumbents' loops.[25] Together with loops, the Commission's requirement that incumbents provide transport, collocation, OSS, and ultimately linesharing under appropriate terms and conditions helped competitors launch this new market. By making concrete the Act's requirement that incumbents open their networks to competitors, the Commission fostered a regulatory climate that enabled competitors to provision innovative technologies that the incumbents had, but were unwilling to offer in the absence of direct competitive pressure.

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[24] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order (rel. August 8, 1996) ("*Local Competition Order*").¶ 1.

[25] *Id.* ¶ 380.

The Commission's local competition rules, therefore, spurred the development of competitive wireline broadband services.[26] This classification is the key to rules that specifically spelled out such ILEC obligations as collocation, unbundling, and interconnection. With these rules in place to clarify their rights, competitive advanced service providers relied on them and began to build their networks and provision service. The Commission's classification of advanced services as "telecommunications service" is a core component of these rules.

1. Based on the Commission's Regulations, Covad Identified a New Opportunity to Provide an Innovative Technology to Consumers

Taking the "green-light" offered by the Commission, Covad immediately began to build its facilities-based network in 1997. Covad was the first competitor to begin offering services using DSL technology. Other wireline broadband entrepreneurs, such as Rhythms and Northpoint, followed Covad's lead and began to build national networks and roll out service in the mid and late 1990s. Many other carriers began to deploy DSL-based technology on a regional basis. In deploying these services (along with accompanying back-office processes, methods of operation and OSS and corporate functions of procurement, fleet, facilities, inventory management, logistics, IT, training, accounting, and the like) these entrepreneurs – as well as the investment community – relied on the Commission's regulatory framework that correctly classified these services as telecommunications services under the statute.

[26] These regulatory obligations are a more concrete and detailed explication of the antitrust requirement that monopolists like the ILECs not restrain competition by refusing to deal with would-be competitors or unreasonably denying them access to resources essential to their ability to compete. The Commission's market-opening rules complemented antitrust rights that could be vindicated only after long, expensive proceedings. The Commission's rules created specific regulatory rights that CLECs could act on far more quickly, and made possible business plans that could attract the investment necessary to compete.

While the incumbents had two-wire DSL technologies available for at least a decade, they refused to implement it for fear that it would undermine their existing, and more lucrative, T1 service. The only DSL technology they commercially deployed prior to 1998 was 4-wire HDSL technology in order to reduce their own costs of providing T-1 service. Until Covad and other competitors deployed various 2-wire DSL technologies, there was no competitive pressure for the ILECs to launch innovative and cost effective technologies, such as ADSL, SDSL or IDSL. As the Commission observed in the fall of 1999

> the development of competition and the threat of losing revenue and customers to carriers offering advanced services provides a powerful incentive for carriers to invest.[27]

Not only did the ILECs initially fail to deploy DSL technology, they aggressively fought to prevent the provision of DSL-based service by competitors. The incumbents baldly claimed that 2-wire DSL- capable loops did not exist in the network, and that to the extent that they did exist, they could not be provisioned to competitors because that would interfere with the provision of voice service. Experience has demonstrated that their contentions were false. Indeed, as the National Research Council's Computer Science and Telecommunications Board report "Broadband: Bringing Home the Bits" concludes, incumbent LECs, on their own, have little or no incentive to invest in network upgrades.

> Once a provider has a broadband-capable system, that provider will spend on upgrades only enough to continue to attract subscribers and retain existing customers by providing a sufficiently valuable service. An incumbent will also naturally weigh the benefits of investment in new services against the costs of cannibalizing from existing ones. For example, an ILEC's incentive to invest in broadband upgrades may be diminished by the prospect that the new technology may be used to provide services that compete with the ILEC's existing voice and data services. Viewing an incumbent's incentives to invest in upgrades from the

[27] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order (rel. November 5, 1999) ("*UNE Remand Order*").¶ 138.

> perspective of the two broadband definitions provided above, it may be hard for the incumbent to justify spending so that the local access link is not the performance bottleneck, or to be in front of the demand so as to stimulate new applications.[28]

Next, incumbents sought to preclude CLECs from placing DSL equipment in central offices, claiming space constraints and network compatibility concerns. Again, these claims could not withstand scrutiny by competitors and state and federal regulators. Incumbents also argued vehemently against linesharing, and then line-splitting, on the basis that the provision of voice and data over the same loop was technically, operationally and otherwise too difficult (despite the simple fact that they sold lineshared DSL services to their own affiliated ISPs). These claims, once again, turned out to be false, false and false.

Spending substantial resources, Covad successfully countered each of these arguments at the Commission and state regulatory agencies, all the while continuing its network build-out and provisioning services. Covad today has over 100,000 line-shared lines in service, has automated almost every process in the delivery mechanism for the service, and sees an exponential increase in this service looming as it gears up to wage a price war for the consumer's broadband business.[29] After lengthy and costly regulatory proceedings at the federal and state levels, the ILECs arguments have so far been rejected. Competitors like Covad are clearly responsible for creating this service, which forced ILECs to provision wireline broadband. Indeed, the Commission has appropriately recognized that competitors "have played a major role" in

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[28] National Research Council, "Broadband: Bringing Home the Bits," National Academy Press, 2002 at Finding 5.2. Abstract available at http://books.nap.edu/html/broadband/summary.html.

[29] At least one cable provider has been reported to be readying a $26 per month cable modem service for a 256 kpbs downstream service. *See* "More Trouble at AOL: Cable Rivals May Push Net Prices Even Lower" Wall Street Journal, Apr. 22, 2002 at B1.

introducing new broadband technologies, such as DSL.[30] Noting that by 1999 CLECs raised "between $15 and $20 billion to invest largely in broadband"[31] the Commission found that all of this investment "appears to have spurred" ILECs to "construct competing facilities."[32] The proposed reclassification of advanced services could inappropriately insulate the ILECs from the very pressure that forced them to provide this broadband technology in the first place.

2. Reclassifying Advanced Services as Unregulated Information Services Would Penalize Covad for Relying on the Commission's Market-Opening Actions

The Commission must understand how its proposed reclassification of these services as information services will directly and fundamentally injure competitors' who have relied on the current regulatory setting to justify the creation of facilities-based networks. As Covad explained in its Triennial Review comments, Covad has relied on the Commission's well-settled, correct interpretation of the Act's requirements by:

- Raising nearly two billion dollars and building a nationwide broadband network based on facilities and equipment that utilize DSL technology (as opposed to some other mechanism for delivering broadband services);
- Obtaining Certificates of Public Convenience and Necessity in states nationwide;
- Negotiating, and sometimes arbitrating, Section 252 interconnection agreements for access to UNEs with every RBOC and several other ILECs;
- Working with equipment developers and vendors and actively participating in standard setting organizations to refine and expand the performance of DSL technology;
- Collocating DSL equipment to access loops, linesharing, and interoffice transport in ILEC central offices;

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[30] *1999 Advanced Services Report* ¶ 41.

[31] *Id.*

[32] *Id.* ¶ 42.

- Designing Covad's inter-central office network and overall backhaul network;
- Building Covad's OSS, which includes automating all of the functions of ordering UNEs in order to reduce costs, increase efficiency and reduce prices so Covad can meet consumer demand;
- Building interfaces from Covad's OSS to the ILECs' OSS;
- Marketing and offering service to millions of American consumers, small and medium sized businesses, and other broadband customers, based on the availability of UNEs to support those service offerings; and
- Generally, developing a financially viable broadband business that is fully funded under the Commission's current UNE rules, serves over 350,000 residential and business customers, and offers nearly 45% of the nation access to innovative, competitively priced broadband services that would otherwise not be available.[33]

Each of these initiatives was based on the fundamental regulatory construct that the telecommunications capabilities used in wireline broadband services are telecommunications services governed by the market-opening provisions of the 1996 Act and the Commission's local competition rules.

In short, Covad designed its entire business, which currently installs over 15,000 new DSL lines for consumers and businesses every month, around the Commission's existing classification of DSL-based transport as telecommunications service, and the related regulatory requirements associated with that classification. Now, having taken costs out of its business, Covad is bringing additional focus to its consumer ADSL line-shared business, trying to defray significant fixed costs and turn a profit by maximizing the utilization of its currently under-utilized network (so that it can enjoy economies of scale as ILECs do). Covad remains committed also to its small business strategy, where its gross margins are much larger.

If the Commission reverses its position on the regulatory classification of DSL transport, it will undermine the competitive regulatory framework that the Commission has created for broadband service. This abrupt about-face will unfairly jeopardize the remaining competitors that have relied on the Commission's longstanding rules implementing the 1996 Act's pro-competitive requirements.

Over the last six years, Covad has fought the ILECs' continual obstructionist efforts in both federal and state regulatory fora (and judicial fora) to build a nationwide broadband network from the ground up and has relied extensively upon the Commission's local competition rules in selecting the architecture for that network. Covad has built its business on the principle that it would be investing in a market in which competition would be permitted.

Should the Commission alter the ILECs' unbundling obligations, Covad's ability to provide broadband service to consumers will be seriously disrupted. The Company's other recourse for vindicating its rights would be expanded antitrust litigation, and while that litigation played out Covad would be forced to re-design its entire network, including (1) obtaining collocation, interoffice transport and loops from third party sources that may or may not exist; (2) ordering, testing, accepting, monitoring, and performing repair and maintenance functions for such network elements and related services, replicating in its own workforce the thousands of ILEC technicians nationwide who have maintained the monopoly loop and transport facilities for a century; and (3) obtaining capital to fund the construction of a parallel network to that of the ILECs at a time when the capital markets are closed to even marginal new investment, not to

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[33] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Comments of Covad Communications Co. (Apr. 5, 2002) ("Covad Triennial Review Comments") at 8.

mention the kind of funding necessary to build another local network from scratch. Such results clearly would defeat the statutory purpose to "promote competition in the telecommunications market."[34]

As the Commission has repeatedly concluded,

> permitting a competitor to purchase unbundled loops from the incumbent LEC allows the competitive LEC to build facilities gradually, and deploy loops for its customers where it is efficient to do so.[35]

The Commission has already properly rejected the notion that consumers are best served by efforts that "lead to competition in patches, rather than the seamless competitive service of a fully competitive market."[36] It should certainly reject efforts to institutionalize the worst elements of monopoly control over the loop. Given a very hostile capital market, the Commission must be wary of ILECs cries for "deregulation" of their bottleneck facilities. As the Commission concluded in the *UNE Remand Order*,

> [n]either self-provisioning loops nor obtaining loops from third-party sources is a sufficient substitute that would justify excluding loops from an incumbent LEC's unbundling obligation under Section 251(c)(3).[37]

B. Any Regulatory "Problem" Affecting Wireline Broadband Services Stems from Ineffective Oversight of the ILECs, Not Excessive Regulation

If the Commission truly wants to foster the development of broadband wireline services, it should focus on enforcing (and reinforcing) its current regulations, not relaxing the ILECs' regulatory obligations. The Commission has worked steadily to craft a regulatory framework for

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[34] 47 U.S.C. § 157 nt. ("Section 706").

[35] *UNE Remand Order* ¶¶ 182-183; *Local Competition Order* ¶ 378.

[36] *UNE Remand Order* ¶ 185.

[37] *Id.* ¶¶ 165; 181-189; *accord Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 98-147, 96-98, Third Report and Order in CC Docket No. 98-147, Fourth Report and Order in CC Docket No. 96-98 ¶ 1 (1999) ("*Linesharing Order*"). ¶ 39.

wireline broadband that will foster a robust competitive market. If the Commission's regulations had been properly implemented, consumers would be enjoying a more robust market today. However, the ILECs have systematically and consistently violated both the letter and spirit of the Act and the Commission's regulations.[38]

The ILECs' constant foot-dragging forced competitors to expend precious resources to enforce Commission regulations, rather than spending their capital to build networks. As a result of these anticompetitive tactics, the ILECs did not have to compete with new entrants on the merits. The ILECs needed only to wait for the CLECs' funding to expire while they litigated competitors into bankruptcy.

The Act's other mechanism meant to discourage these campaigns of anticompetitive conduct was Section 271. The lure of inter-LATA long-distance authority, however, has not been an effective source of compliance pressure on the ILECs. Now, moreover, the ILECs have largely broken through the Section 271 barrier, and no longer experience whatever procompetitive incentives that provision created. Predictably enough, ILECs appear to become more aggressive in discriminating against competitors after they receive 271 authority. While states have implemented Performance Assurance Plans designed to prevent backsliding, the effectiveness of these plans is highly questionable.[39] There have been numerous examples of

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[38] *See, e.g., BellSouth Corporation*, Order and Consent Decree, FCC 00-389, File No. EB-00-IH-0134 (rel. Nov. 2, 2000); *Verizon Communications, Inc.*, Order and Consent Decree, DA 01-2079, File No. EB-01-IH-0236 (rel. Sept. 14, 2001).

[39] *See Bell Atlantic-New York Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York,* Order and Consent Decree, File No. EB-00-IH-0085, FCC 00-92 at ¶ 7 (Mar. 9, 2000).

ILECs failing to provide complete and accurate information for the PAPs.[40] Indeed, after the Commission's Order granting Verizon interLATA authority in New York, competitors noted an "unconstrained aggressiveness" in Verizon's attempts to dismantle competition and put them into a price squeeze.[41]

None of this should be surprising, in light of the ILECs' general disregard of Commission orders. Most recently, the Commission issued a forfeiture order against SBC for "willfully" violating a Commission order.[42] SBC "intentionally refused to provide" a sworn statement, as ordered by the Commission, in answering questions regarding SBC's discriminatory provisioning and maintenance of DSL technology. The Commission also noted "possible misrepresentation by SBC to the Enforcement Bureau of the Commission."[43] This was not an isolated event. As the Commission noted, in at least two other enforcement investigations, "both of which involved possible misrepresentations by SBC," the ILEC ignored similar Bureau directives.[44] And SBC's antics are not limited to the Federal arena. As early as 1999, the Texas PUC imposed unprecedented sanctions on the company for misrepresentations made in the PUC's arbitration of Covad and Rhythms interconnection agreements, and urged SBC "to take

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[40] During the New Jersey state proceeding, Verizon revealed that it had filed incomplete information on its reports. Letter from Gregory K. Smith, AT&T to Henry Ogden, New Jersey Board of Public Utility (Dec. 21, 2001). As explained in more detail below, there are numerous examples of SBC's refusal to provide specific information requested by the Commission on its reporting.

[41] *See, e.g., Proceeding on Motion of the Commission to Examine New York Telephone Company's Rates for Unbundled Network Elements*, Recommended Decision, Case No. 98-C-1357 at 13-14 (May 16, 2001). *See also Bell Atlantic-New York Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York,* Order and Consent Decree, File No. EB-00-IH-0085, FCC 00-92 ¶ 7 (Mar. 9, 2000); *Consultative Report on the Applications of VNJ New Jersey Inc. for FCC Authorization to Provide In-Region, interLATA Service in New Jersey,* NJ BPU Docket No. TO0109541, AT&T Initial Brief at 39; *id.,* Lightpath Initial Brief at 22, n.76.

[42] *SBC Communications, Inc. Apparent Liability for Forfeiture*, FCC 02-112, File No. EB-01-IH-0642, Forfeiture Order, ¶ 5 (Rel. Apr. 15, 2002) ("*SBC Forfeiture Order*").

[43] *Id.* ¶ 2.

[44] *Id.* n.7.

remedial action to improve its process for communicating 'the whole truth' to the Commission."[45]

Notably, the genesis of the FCC's Forfeiture Order was an inquiry regarding SBC's provisioning of DSL technology. In that matter, the Commission was acting under its Title II jurisdiction over SBC's provisioning of DSL-based services on the basis that it may "inquire into the management of the business of all carriers subject to this Act."[46] If the Commission now decides that these services are not "telecommunications services," it will have abandoned the source of its authority to demand accountability and veracity from SBC in this important area. Given SBC's recent transgressions in this area, it makes no sense for the Commission to walk away from its regulatory responsibilities.

Other examples of ILECs violating local competition rules abound. SBC's recent Forfeiture Order comes on the heels of a finding in February that the company had committed twenty-four violations of collocation rules.[47] Similarly, two years ago the Commission found that SBC had failed to meet performance goals established in the Carrier-to-Carrier Performance Plan that the Commission adopted as a condition of SBC's merger with Ameritech[48].

Other ILECs have also been sanctioned for violation of local competition rules. GTE, for example, agreed to a fine to settle charges that it violated those rules.[49] Likewise, BellSouth and

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[45] *Petitions of Accelerated Connections, Inc. and DIECA Communications, Inc. for Arbitration of Interconnection Agreements with Southwestern Bell Telephone Company*, Public Utility Commission of Texas Docket No. 20226, Order No. 20 at 34 (1999).

[46] *SBC Forfeiture Order* ¶ 7, n.17 citing 47 U.S.C. § 218.

[47] *SBC Communications, Inc. Apparent Liability for Forfeiture*, FCC 02-61, File No. EB-00-IH-0362a, Order on Review, ¶ 5 (rel. Feb. 25, 2002)

[48] *SBC Communications, Inc. Apparent Liability for Forfeiture*, Notice of Apparent Liability for Forfeiture, FCC 02-07, File No. EB-01-IH-0030 ¶ 23 (rel. Jan. 18, 2002)

[49] *GTE Service Corp., Order and Consent Decree,* FCC 00-281, File No. EB-00-IH-0113 ¶ 14 (rel. Aug. 1, 2000).

Verizon have likewise agreed to pay fines in conjunction with investigations into such violations.[50]

The ILECs' disregard for the Commission's authority stems from their secure position of market dominance. This pattern of conduct demonstrates that now is not the time for further relaxation of ILECs' section 251(c) obligations. If this is how the ILECs operate with regulations in place, they will have virtually no incentive to promote competition if they are deregulated through the reclassification of advanced services. These repeated and blatant violations demonstrate that the Commission should focus additional attention and resources on enforcing its current regulations, not abandoning them.

Exacerbating the problem is the level of the fines the Commission imposes, which provide little incentive for the ILECs to comply with Commission directives. To take the most striking example, SBC's penalty under the Forfeiture Order discussed above was $100,000, a miniscule fraction of the company's daily revenues. While other fines were larger, none of them could amount to more than a minor annoyance for the affected ILEC.

The Commission appears to recognize this. Chairman Powell has asked Congress to increase "the forfeiture amount to at least $10 million in order to enhance the deterrent effect of Commission fines."[51] Moreover, the Chairman requested that Congress give the Commission authority to award punitive damages, attorneys fees and costs in formal complaint proceedings.[52] Chairman Powell is correct that given the "vast resources of many of the nation's ILECs," the

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[50] *Verizon Communications, Inc.*, Order and Consent Decree, DA 01-2079, File No. EB-01-IH-0236 ¶ 11 (rel. Sept. 14, 2001).

[51] Letter from Michael K.Powell, Chairman, Federal Communications Commission, to leaders of the Senate and House Commerce and Appropriations Committees at 1 (May 4, 2001) ("Powell Letter").

[52] Powell Letter at 2.

current limit of $1.2 million is insufficient to deter violations.[53] For many large carriers, he noted "the penalties could be absorbed as the cost of doing business."[54]

There is a serious question whether even the increased fines Chairman Powell seeks will have any teeth. Based on SBC's reported 2001 revenue, the current maximum fine of $1.2 million would represent the revenue from 13 minutes and 44 seconds of telephone use. The proposed $10 million fine would represent only 1 hour, 54 minutes and 29 seconds worth of revenue. To put the matter in more approachable terms, to SBC a ten million dollar fine would be the equivalent of a family with a $75,000 income paying a parking ticket of $16.33. Even if these fines could get the attention of an ILEC, moreover, increased fining authority would only be useful if the Commission retained the procompetitive rules that would form the basis for issuing a fine.

In summary, some of the most egregious behavior that the Commission has tried, however bootlessly, to prevent concerns the very services the Commission now seeks to exempt from the local competition rules. This Commission offers a perverse answer to this problem: exempting the ILECs from the very rules that they have disregarded. Then, the Commission will be unable to penalize incumbents for resisting with DSL-based unbundling obligations, if these services are suddenly reclassified as information services. The incumbents' threats to refuse to deploy advanced services until regulators relieve them of their regulatory obligations under the 1996 Act is far from a justification for a significant policy reversal. Rather, it is a declaration that the ILECs remain committed to continuing decades of anticompetitive behavior.

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[53] *Id.* at 1.

[54] Speech of Michael K. Powell, Chairman, Federal Communications Commission at ALTS conference, Crystal City, VA, November 30, 2001. http://www.fcc.gov/Speeches/Powell/2001/spmkp111.html.

That prospect calls for more vigilant enforcement, not an award to ILECs of the unrestrained monopoly they seek.

C. History Demonstrates That the ILECs are Less Likely – Not More Likely – to Deploy DSL if They Do Not Face CLEC Competition

Incumbent LECs' tired threats to forego deployment of DSL-based technology unless and until they are afforded the incentive of deregulation is nothing more than a scare tactic designed to eliminate competition and restore their monopoly position. As this Commission has observed, however, "the 1996 Act does not permit the leveraging of a historic monopoly into a nascent industry or market."[55] Moreover, the ILECs' own history and the economics of network deployment reveal the emptiness of this threat.

The ILECs refused to deploy consumer and small business DSL services when they enjoyed a monopoly on this technology. Before the 1996 Act and the competitive entry that followed the *Local Competition Order*, and, therefore, long before incumbents could claim (erroneously) that they were overburdened by regulations requiring them to share their facilities, they could have rolled out ADSL, SDSL and IDSL services, but they did not. The fact is that under the very conditions that they now seek the ILECs refused to deploy DSL-based technology (other than 4-wire HDSL technology) in order to preserve the demand for their more expensive T1 service among consumers who would have preferred a less expensive option directed to their needs.

Indeed, the incumbents were forced to deploy ADSL technology only when they faced competitive pressure exerted by Covad and other CLECs operating under the Commission's local competition rules. Not only did the ILECs then start to deploy ADSL service, they were

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[55] *Linesharing Order*, ¶ 29 n.53.

able to launch an aggressive roll out, despite their statutory obligations to provide competitors with non-discriminatory unbundled network elements at cost-based pricing. Moreover, the incumbents were quickly able to dominate the provision of residential DSL services throughout their regions despite varying UNE rules and pricing among the different states.[56] These events thus progressed through four stages:

Stage 1. Facing no advanced services competition, the incumbents had the technology to provide consumers with a variety of DSL-based services, but kept that technology under wraps.

Stage 2. Congress passed the 1996 Act, and the Commission enacted rules specifying ILECs' obligations under the Act.

Stage 3. Competitors emerged and began the process of deploying DSL-based services and offering them to competitors.

Stage 4. The ILECs responded to competition by themselves deploying and offering DSL-based services.

No one looking at this history could conclude that DSL deployment would be increased by a return to Stage 1. Yet – now that the ILECs have been forced by competition to offer services – we confront just such a proposal: a return to Stage 1, the stage characterized by a dearth of both competition and service innovation.

Once in Stage 4, moreover, the ILECs' strategy has been to take all possible steps to retard competition while they secure the market for themselves. Despite the requirement that they provide non-discriminatory access to their networks, the ILECs purposefully denied CLECs

[56] A study ordered by the California PUC and provided to the Commission is a good example of the difficulties CLECs have had in deploying DSL services in areas served by DLC. In the period between June 6 and July 20, 2000, SBC's ASI (the former SBC advanced services affiliate) claimed that it and Pacific Bell processed over 20,000 requests for line-shared services. *See* Letter from Cristin Flynn, WorldCom to Magalie Roman Salas, FCC, CC Docket Nos. 98-147, 96-98, 98-146 (Aug. 18, 2000) (annexing status reports of Covad Communications, Inc., Rhythms Links, Inc., NorthPoint Communications Inc. and Pacific Bell, from California PUC DSL Proceeding) (DLECs Status Report). However, during the time that Pacific Bell provisioned 20,0000 loops for its advanced service affiliate, *it had not provisioned a single line-shared loop for Covad, Rhythms or NorthPoint in California*. DLECs Status Report at 4. CLEC requests for line-sharing at collocation sites in the same central offices were flatly rejected by Pacific Bell. *See id.* at 7.

line-sharing while they locked AOL, Earthlink, and MSN into long term, high volume ADSL commitment contracts. They also offered and sold ADSL service to corporate entities for telecommuters and smaller ISPs both before and after they were required to provide CLECs linesharing. While the Commission ordered the ILECs to provide CLECs linesharing starting on June 6, 2000 (more than 4 years after the passage of the 1996 Act), as a practical matter they did not do so in a scalable way until 2001. There can be no doubt that the ILECs continue to dominate the sales of such services today.

Tellingly, the Commission's recent Report to Congress finds (based on carriers' own data) that the incumbent phone companies now control an incredible *93%* of DSL lines in service. It is inconceivable that the Commission could give any credence to Bell company arguments that they are handicapped by existing unbundling regulations. The facts – not only the Commission's conclusions regarding the reasonable and timely nature of broadband deployment, but the ILECs' own statistics regarding the explosion of their retail DSL offerings – belie any contention that the Commission's rules inhibit their investment.

The Commission need only look at the ILECs' deployment statistics to see what truly sparks consumer and small business DSL deployment. Only competition could force these monopolists to take a technology that had put in a lockbox for over a decade and deploy it for the benefit of consumers. As the following chart demonstrates, the incumbents were immediately sparked into action by the advent of competition, deploying broadband services at an incredible clip – increasing their presence *one hundred fold* in just three short years, once they were awakened by competition from firms like Covad.

Carrier	Lines in Service			
	1998	1999	2000	2001
Verizon	N/A	N/A	540,000	1.2 million
Bell Atlantic		30,000	N/A	
GTE		57,000	N/A	
Qwest	N/A	N/A	255,000	448,000
US West		110,000	N/A	
SBC		169,000	767,000	1.3 million
BellSouth		20,000	215,000	621,000
Covad		57,000	274,000	351,000
Total	38,000 (est.)	491,000	2.3 million	3.9 million

Clearly, the incumbent phone companies are not handicapped by the current classification of DSL as a telecommunications service. More importantly for the purposes of this proceeding, history teaches us that consumers have benefited from the availability of more, rather than fewer, broadband options. This is particularly true for business customers that have been largely ignored by ILEC DSL deployment.

The Commission's conclusions concerning the pace of broadband adoption have been echoed by the Administration in recent findings. The Department of Commerce recently reported in *A Nation Online: How Americans Are Expanding Their Use Of The Internet*, that 11% of the nation's population (representing 20% of the nation's Internet users) accessed the

Internet via broadband connections in September 2001.[57] That figure is up from 5% penetration in August 2000 – a 116% leap in broadband subscriptions in only *one year*. The Commerce Department also ratified the Commission's finding that broadband deployment expanded from 56% of the nation's zip codes in 1999 to 75% of the nation's zip codes by 2000. Indeed, the Department of Commerce concluded that broadband deployment has outpaced the adoption rate of most other popular communications technologies, such as color television, cell phones, pagers, and VCRs.

Given the Commission's statutory obligation to promote the deployment of advanced services, the Commission's decision process in this proceeding must start and finish with an inquiry into what regulatory structure will best promote the competitive deployment of advanced telecommunications services.[58] It is clear that the Commission's current classification of DSL-based transport as a telecommunications service has been a key ingredient in broadband deployment.

It is clear, however, that the ILECs' real benefit from the proposed deregulation would not be the ability to deploy DSL technology – they have already proven that they will implement this technology even in the face of unbundling obligations, but only if they face competition. So, the real benefit to the ILECs is the elimination of competition. By attempting to blackmail the Commission with threats of non-deployment, the incumbents are trying to escape their obligations to make their network available to the very competitors who forced the ILECs to begin offering this service in the first place.

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[57] Available at http://www.ntia.doc.gov/ntiahome/dn/index.html. All statistics cited are from Chapter 4 of the Report.

[58] 47 U.S.C. § 157 nt.